



TESTIMONY OF THE DEPARTMENT OF THE ATTORNEY GENERAL TWENTY-SIXTH LEGISLATURE, 2012

ON THE FOLLOWING MEASURE:

H.B. NO. 2461, RELATING TO GOVERNMENT TORT LIABILITY.

BEFORE THE:

HOUSE COMMITTEE ON THE JUDICIARY

DATE: Friday, February 10, 2012

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Robin Kishi, Deputy Attorney General

Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

The purpose of this bill is to amend section 662-5, Hawaii Revised Statutes (HRS), to afford the State of Hawaii, when it is sued in tort, the right to demand a jury trial in the same manner and to the same extent as a private individual under like circumstances.

Chapter 662, HRS, is referred to as the State Tort Liability Act. Before the State Tort Liability Act, the State under the doctrine of sovereign immunity, could not be sued. Except for prejudgment interest, punitive damages, and enumerated exceptions, the State waived its immunity from tort liability by section 662-2, HRS, and declared that it would be liable in the same manner and to the same extent as private individuals under like circumstances.

Private individuals sued in tort may demand jury trials under HRS sections 603-21.5 and 635-14, HRS, and Hawaii Rules of Civil Procedure, rule 38(b) and (c), or they may waive that right. Currently, however, the State is not on equal-footing with private individuals under like circumstances. This is because the State does not have the same right as private individuals to demand jury trials, or elect to waive that right.

In addition, plaintiffs often sue both private defendants who have made a demand for jury trial, as well as the State as a defendant. In those cases, it is necessary for the jury to determine the claims against the private defendants, and the judge to determine the claims against the State. This creates the possibility of inconsistent verdicts.

For example, the jury may determine that the Private Defendant "A" is 20 percent at fault, Private Defendant "B" is 20 percent at fault, Plaintiff is 40 percent at fault, and the State is

20 percent at fault. The judge may determine that the State is 30 percent at fault, and Plaintiff only 10 percent at fault. The judge's decision would necessarily alter the jury determination and thereby increase the percentages of fault for both Private Defendants.

Section 662-5, HRS provides that tort actions against the State shall be tried without a jury unless all parties consent and the court so orders. In other words, only if all other parties involved in the lawsuit agree, and only if the judge to which the lawsuit is assigned deems it appropriate and so orders, will the State be able to have a jury trial in that lawsuit.

A private individual or entity, in consult with their attorneys, is in the best position to determine whether the claims against them and the issues involved should be tried by a jury or a judge. Similarly, the State, in consult with its attorneys, is in the best position to determine whether the claims against it and the issues involved are best tried by a jury or a judge. Because the State is supposed to be sued and held liable in the same manner and to the same extent as private individuals, the State ought to have the same right to demand jury trials.

This bill will ensure that the State is placed on equal-footing with other private individuals sued in tort, and ensure that the decisions and judgments in which the State is a defendant are consistent and equitable.

We respectfully request that the committee pass this bill.

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII
ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. NO. 2461**

Date: Friday, February 10, 2012

Time: 2:00 pm

To: Chairman Gilbert Keith-Agaran and Members of the House Committee on Judiciary:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to H.B. No. 2461, relating to Government Tort Liability.

Section 1 of this bill states that its purpose is to give the State the same rights as a private individual to demand a jury in a tort action involving the State. However, the actual language of the bill gives only the State the right to demand a jury trial, not individual citizens.

Current law provides that tort claims against the State are to be tried to a judge, unless both the State and individual bringing the claim agree to a jury trial. The rights of the State and private individuals are equal - - neither one has the right to unilaterally demand a jury trial - - both must agree.

If the bill's intent is to give the State and its citizens equal rights to elect trials by jury, paragraph (b) (page 1, lines 14 – 16) should be deleted and replaced with the following:

“(b) Any party may demand trial by jury in any action against the State under this chapter; provided that the demand is made in the same manner as a private individual in a tort action.”

HAI opposes this bill if its purpose is misstated and its real intent is to give only the State the right to demand a trial by jury. This would give the State an unequal and unfair advantage over private citizens. Equal balance should be maintained such that they both should have the right to elect a trial by jury or they both should not have the right. It is fundamentally unfair to tip the current balance in favor of the State by giving only the State the right to demand a jury trial. This would allow the State to cherry pick judges for its case. If the State likes a certain judge, it will have the right to require a trial by that judge since the individual citizen cannot elect a jury trial. If the State does not like a judge, under this bill the State, and only the State, can demand a jury trial. This gives the State an unfair advantage because the State knows who the judge is before it must decide whether to elect a jury trial or not. It is bad public policy to give the State the ability to cherry pick its judges and undermines the public's confidence in the fairness and impartiality of our legal system and our government.

Thank you very much for allowing me to testify in OPPOSITION to this measure. Please feel free to contact me should you have any questions or desire additional information.